No. 80-1343

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AERONAUTICAL RADIO, INC., and
AIR TRANSPORT ASSOCIATION OF AMERICA,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents Federal Communications Commission ("FCC") and American Telephone & Telegraph Co. ("AT&T") have opposed the petitions for certiorari filed by Aeronautical Radio, Inc. ("ARINC") and the Air Transport Association of America ("ATA") in this case (No. 80-1343),[1] and by the Solicitor General in No. 80-1408. In seeking to minimize the importance of the FCC's refusal to reject AT&T's tariff filing which would terminate Telpak service, the respondents ignore the fundamental questions raised by the Commission's unprecedented construction of the Communications Act and the appellate court's denial of judi-

[1] The statement required by Rule 28.1 of the Rules of this Court appears at ARINC Pet. ii.

cial review of that construction. The Commission's decision would deny the public the statutory protections of the Act against unreasonable rate increases or unjustified withdrawals of service and thereby create a gap in the comprehensive regulatory plan of the Act. The problems created by this decision are exacerbated by the ruling of the court below that such statutory construction is immune from judicial review.

The FCC's Orders Reflect a Final Decision on the Merits

Contrary to the assertions of the respondents, this is not a case involving only the exercise of agency discretion.[2] A reading of the text of the FCC's key decision denying petitions to reject (App. 67-76)—rather than the respondents' *post hoc* characterization of that decision[3]—reveals the FCC's conclusion *as a*

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[2] FCC Br. 10-15; AT&T Br. 9-14. The decisions upon which respondents principally rely, Southern Ry. v. Seaboard Allied Milling Corp., 442 U.S. 444 (1979); Arrow Transp. Co. v. Southern Ry., 372 U.S. 658 (1963); and Papago Tribal Util. Auth. v. FERC, 628 F.2d 235 (D.C. Cir.), *cert. denied*, 101 S. Ct. 784 (1980), are not controlling here.

In particular, the Commission's decision did not depend upon its "sound discretion [in] waiving Section 61.38" (FCC Br. 17). Rather, the Commission did not believe that either Rule 61.38 or Section 204 of the Act was applicable. Thus, the FCC's purported "waiver" of Rule 61.38 is, as the Solicitor General has explained (United States Pet. 7 n.10), very different from the circumstances of cases cited by respondents. The FCC (Br. i) and AT&T (Br. 11) simply misstate the issue in asserting that the "waiver" is the center of controversy.

[3] The text of the FCC's decision (App. 74) simply does not support the elaborate *post hoc* rationalizations now presented by respondents (FCC Br. 6, 13; AT&T Br. 12). For example, the FCC found that its investigation in Docket 20814 "has no relevance"

matter of law that *none* of the specific protections of the Act and the FCC's implementing regulations restricts AT&T's ability to withdraw Telpak service: On the one hand, the filing was found not to be an increase in charges with respect to the FCC's authority under Section 204 to order a carrier to account for increased charges and the cost justification requirements of Rule 61.38, which implements Section 204;[4] on the other hand, the agency found that Section 214, which requires prior approval to terminate a service, did not apply because the filing was only a rate increase.[5] Thus, the FCC has made a final determination

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to the termination of Telpak. (App. 75). Thus, the Solicitor General is entirely correct in noting that AT&T provided *none* of the economic data relating to Telpak users who would be forced to switch to single-channel services. United States Pet. 7 n.10.

[4] The FCC's finding that "we do not have the authority under Section 204 to order an accounting in the instant [Telpak] case" is contained in the FCC's companion decision in AT&T (Docket 20814), 65 F.C.C.2d 295, 304 (1977), issued simultaneously with the refusal to reject. *See* Pet. 8 n.8.

[5] The FCC's apparent assertion that it has met *sub silentio* the requirements of Section 214 (FCC Br. 21-22) is not only incorrect but contrary to its own contentions one page earlier. The FCC has never made any such findings of public interest and necessity, and its orders below pointedly avoided any discussion whatsoever of the impact of the termination of Telpak upon users. As to the *Resale and Shared Use* decision, 60 F.C.C.2d 261 (1976), the discussion quoted by the FCC referred only to AT&T's alleged business considerations, not to the circumstances of Telpak users. Finally, the FCC's effort to glean from *Resale and Shared Use* a substantive finding of public interest regarding Telpak conflicts with its own assertion one page earlier (trying to avoid the implications of that same decision on appeal) that the application of Section 214 to the termination of Telpak was "a matter the agency had not yet considered." FCC Br. 20-21 n.39.

as to its authority under Sections 204 and 214 of the Communications Act and found neither to apply.

The Court of Appeals' Decision Denies Review of the FCC's Construction of Section 204 and Rule 61.38

The decision of the court of appeals denying review means that only *common carriers,* and not their customers, would be entitled to judicial review of orders of the FCC which construe these provisions of the Communications Act and the FCC's implementing regulations. Respondents do not deny that if the FCC decided to reject a tariff filing as violative of the Act, the *carrier* would be able to seek judicial review of that action.[6] Similarly, the *carrier* would be entitled to a review of the agency's construction of the provisions of Section 204 upon completion of an investigation launched under that provision. Yet, the court of appeals has denied to the carriers' customers judicial review of the FCC's orders which were premised on the agency's determination that Section 204 and 214 of the Act *did not apply* to AT&T's tariff filing.

A complaint brought by a *customer* under Sections 206-209 of the Act against the rates would not afford an opportunity for judicial review of the Commission's overly narrow construction of Section 204 and Rule 61.38. As a consequence of this imbalance in the judicial review process, Section 204 and Rule 61.38 can only contract in scope over time, because only carriers would ever be able to challenge the agency's interpretation.

It is the renunciation of the FCC's regulatory authority that petitioners urge this Court to review.

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[6] American Broadcasting Cos. v. FCC, No. 79-1261, slip op. at 7-8 (D.C. Cir. Oct. 9, 1980).

The decision of a regulatory agency not to apply or to be bound by the controlling provisions of its organic statute, or a misapplication of those provisions, raise a fundamental question of law which this Court should review, just as it reviewed and reversed orders of the Federal Power Commission which effectively exempted certain transactions from statutory standards. *FPC* v. *Texaco, Inc.*, 417 U.S. 380 (1974). The denial of judicial review where the agency has issued an adverse decision on the merits, conflicts with the judicial review principles enunciated in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

Neither the respondents nor the court below have identified any evidence of Congressional intent to deny judicial review in such circumstances.[7] Thus, the decisions below raise important issues meriting review by this Court because, as explained by the Solicitor General, they "deprive ratepayers of important protection under the Communications Act." United States Pet. 7.[8]

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[7] The extent to which the FCC's orders reflect an adverse construction of the Act's provisions with respect to the petitioners' challenges sharply differentiates this case from those relied upon by AT&T and the Commission. A denial of immediate judicial review may be quite proper where the agency is already conducting an investigation into asserted factual deficiencies of a tariff filing, as in *Papago* (628 F.2d at 239), or where the agency has not purported to construe the application of substantive law, but is conscious of the alleged shortcomings of a tariff filing and has invited the filing of a complaint by affected users, as in *Southern Railway*.

[8] Although the FCC and AT&T assert the availability of a complaint mechanism to investigate the circumstances of Telpak users, neither respondent acknowledged that the FCC has already conducted a 20-year investigation of Telpak. This case is not the beginning of an administrative proceeding, but the end of one. That proceeding, however, did not produce the results sought by the

In addition, neither the FCC nor AT&T make any attempt to show that the supposed complaint remedy can afford any relief whatsoever to Telpak users regarding the "splashover" effect of Telpak's termination. Given the structure of the Telpak offering, the termination of the interstate portion of the Telpak offering by AT&T will result in significantly increased *intrastate* charges over which the FCC has no jurisdiction. (ARINC Pet. 20).[9] Even the *Papago* case, on which respondents so heavily rely, expressly recognizes that its principle of non-reviewability cannot be applied to a case involving such a "splashover" effect. 628 F.2d at 241 n.15; *see FPC* v. *Hunt*, 376 U.S. 515, 524 (1964). The FCC's and AT&T's inability to articulate any justification for the court of appeals' contrary decision below is telling indeed.

ARINC and ATA raise their concerns as to the broader adverse impact of the decisions below in all

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FCC: the three cost studies in the record (conforming to the *FCC's own cost methodology*) disproved the FCC's suppositions that Telpak was not compensatory. (App. 145, 154; ARINC Pet. 5-6). The FCC's steadfast refusal to acknowledge those results which conflict with its predetermined conclusions belies its assertion that it has made no determinations on the merits (FCC Br. 14, n.27). The court of appeals' withdrawal (App. 58) of its initial decision reversing the FCC's determination that "the elimination of TELPAK [did not] constitute[] a rate increase" (App. 25), effectively reinstated the FCC's finding that no increase in charges is involved—a substantive finding that fairly dooms any subsequent "complaint" by affected users.

[9] Indeed, a state law remedy might well be unavailable as well to challenge the effects of AT&T's interstate tariff changes. *See* Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 49 U.S.L.W. 4232 (U.S. March 9, 1981).

earnestness.[10] The FCC's restrictive construction of the protections of the Act and its rules, and the court of appeals' decision denying review, apply not only to Telpak but to other bulk offerings and, thus, present grave concerns for the future. The discussion of WATS (ARINC Pet. 26-28) was not mere speculation but an application to another concrete context of the FCC's holding that Section 214, as well as Rule 61.38 and the accounting order provisions of Section 204, are inapplicable as a matter of law to the withdrawal of a bulk tariff offering. No discretion would be involved with respect to a statute or rule that the FCC has already construed to be inapplicable in such contexts.

CONCLUSION

Petitioners ARINC and ATA urge this Court to grant certiorari in this case to review the judgment below, the effect of which is to deny judicial review of the FCC's construction of the Communications Act and its implementing regulations. In the guise of a nonreviewable, discretionary decision, the FCC has made a final determination of important statutory and regulatory questions adversely to the petitioners and

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[10] AT&T errs in suggesting that ARINC failed to raise below its concerns regarding the availability of 230.4 kbps wideband data service and the shared use restrictions on switched private line service (AT&T Br. 19). AT&T's concession that its then-current tariffs offered no practical substitute for the wideband data service under Telpak was made in AT&T's Transmittal No. 13553, filed Sept. 22, 1980, and was timely raised by ARINC on rehearing. Also, ARINC's challenge to the restrictions on shared used has still not been resolved by the Commission on petition for reconsideration of AT&T (Transmittal No. 12715), 64 F.C.C.2d 1003 (1977), but was brought to the attention of the court below.

to other Telpak users. That guise should not be permitted to defeat judicial review of the FCC's actions.[11]

Respectfully submitted,

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[11] "Sections 402(a) [of the Communicatons Act] and 2342 [of Title 28] contain sufficient play to permit judicial intervention where it seems that an agency has departed from the normal course of its proceedings to make gratuitous prejudicial determinations or has otherwise cloaked the kinds of actions and harms normally associated with orders in nonreviewable garb." American Broadcasting Cos. v. FCC, No. 79-1261, Slip op. at 8 (D.C. Cir. Oct. 9, 1980), *citing* American Tel. & Tel. Co. v. FCC, 602 F.2d 401, 409 (D.C. Cir. 1979).

see80

1408

see 80

1683

see 80

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